90-992

No. .....

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF NEVADA, et al.,

Petitioners,

v.

JAMES D. WATKINS, Secretary of the United States Department of Energy, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Property Clause, Art. IV, § 3, cl. 2 of the United States Constitution, may serve as a textual basis for Congress' power to enact the Nuclear Waste Policy Act of 1982, Pub. L. No. 97-425, 96 Stat. 2211, (NWPA) 42 U.S.C. §§ 10101 et seq. and the Nuclear Waste Policy Amendments Act of 1987 (Amendments Act) Pub. L. 100-203, Title V, 101 Stat. 1330.

II.

Whether the Property Clause may preempt, without reference to the preemptive effect of another enumerated power, the State of Nevada's legislative enactments that either veto or otherwise conflict with the federal high-level radioactive waste repository program.

III.

Whether positive limitations in the

Constitution restrict Congress' power to impose a locally opposed federal facility for privately produced high-level radioactive waste disposal on an unconsenting state such as Nevada.

IV.

Whether the enactment by Congress of a statute that identifies and singles out the State of Nevada to shoulder the entire economic, environmental, health and safety consequences of hosting a federal repository for the Nation's privately produced high-level radioactive waste through provisions included in a Title of an Omnibus Budget Reconciliation Act, which provisions were drafted by a conference committee, is a violation of Nevada's Tenth Amendment rights.

V.

Whether Nevada has effectively exercised a constitutional right and/or a right emanating from Sections 115 and 116

of the Nuclear Waste Policy Act to veto the development of a high-level radioactive waste repository at Yucca Mountain Nevada.

VI.

Whether the Secretary of Energy abused his discretion by failing to establish procedures for addressing disqualification criteria set forth in 10 C.F.R. Part 960 on a continuing basis and by failing to determine that the Yucca Mountain site is unsuitable for development as a repository.

PARTIES

A list of all parties who initiated the two proceedings in the Ninth Circuit Court of Appeals whose judgment is sought to be reviewed, as well as respondents and intervenors, appear in the caption of the cases reproduced at pp. 1 to 2 of the Appendix.

The Petitioners before this Court

are the State of Nevada; Bob Miller, Governor of Nevada; Harry Reid, United States Senator; Richard H. Bryan, United States Senator; Barbara Vucanovich, United States Representative in Congress and James Bilbray, United States Representative in Congress.[1]

The Respondents are the United States Department of Energy, James D. Watkins, Secretary of Energy and the following Utilities:

Arizona Public Service Company; Baltimore Gas & Electric Company; Carolina Power & Light Company; Consolidated Edison Company of New York, Inc.; Detroit Edison Company; Duke Power Company; Duquesne Light Company; Florida

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[1]Pursuant to Fed R. App. P. 43(c)(1) and Rule 35.3 of this Court the following substitutions are noted: Bob Miller, Governor of Nevada, is substituted for Richard H. Bryan, as former Governor of Nevada, Harry Reid, United States Senator, is substituted for Paul Laxalt, former United States Senator, James Bilbray, United States Representative in Congress, is substituted for Harry Reid, former United States Representative in Congress.

Power & Light Company; Gulf States Utilities Company; Iowa Electric Light & Power Company; Madison Gas and Electric Company; New York Power Authority; Northeast Utilities; Northern States Power Company; Pennsylvania Power & Light Company; Public Service Electric & Gas Company; Union Electric Company; Virginia Power; Wisconsin Electric Power Company; Wisconsin Power and Light Company; and Wisconsin Public Service Corporation.

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STATE OF NEVADA, et al.,

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JAMES D. WATKINS, Secretary of the United States Department of Energy, et al.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, the State of Nevada et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on September 19, 1990.

OPINIONS BELOW

OPINIONS OF COURT BELOW

The Opinion of the Ninth Circuit Court of Appeals whose judgment is sought

to be reviewed is reproduced at pp. 1 to 37 of the Appendix. It is officially reported at 914 F.2d 1545 (9th Cir. 1990).

The Ninth Circuit Court of Appeals had original jurisdiction of the matters in controversy pursuant to Section 119 of the NWPA, 42 U.S.C. § 10139. There are no other reports or opinions delivered in the case by other courts or administrative agencies.

JURISDICTION

The judgment of the Ninth Circuit Court of Appeals was entered on September 19, 1990. There was no petition for rehearing.

This Court's jurisdiction to review the Ninth Circuit Court of Appeals judgment and opinion is conferred by Article III of the Constitution, 28 U.S.C. § 2106 and Section 119 of the NWPA, 42 U.S.C. § 10139.

CONSTITUTIONAL PROVISIONS, APPLICABLE STATUTES AND REGULATIONS

The clauses and provisions of the Constitution are cited below and set forth verbatim at pp. 38 to 42 of the Appendix.

Property Clause, Art. IV, § 3, cl. 2; Federal Enclave Clause, Art. I, § 8, cl. 17; Bicameralism and Presentment Clause, Art. I, § 7, cl. 2, cl. 3; General Welfare Clause, Art. I, § 8, cl. 1; Guarantee Clause, Art. IV, § 4; Supremacy Clause, Art. VI, cl. 2 and Tenth Amendment.

The provisions of the Nuclear Waste Policy Act, as Amended, 42 U.S.C. § 10101 et seq. involved in this case are as follows:

Section 111, 42 U.S.C. § 10131

Section 112, 42 U.S.C. § 10132

Section 113, 42 U.S.C. § 10133

Section 114, 42 U.S.C. § 10134

Section 115, 42 U.S.C. § 10135

Section 116, 42 U.S.C. § 10136

Section 119, 42 U.S.C. § 10139

Section 160, 42 U.S.C. § 10172

Section 302(a)(5), 42 U.S.C. § 10222(a)(5)

Section 407, 42 U.S.C. § 10247

They are reproduced in the Appendix, pp. 43 to 138.

The following federal regulations are involved in this case:

10 C.F.R. § 60.2

10 C.F.R. § 60.121

10 C.F.R. Part 960

Except for 10 C.F.R. Part 960, they are reproduced in the Appendix, pp. 139 to 141. 10 C.F.R. Part 960 is voluminous. As no individual sections of 10 C.F.R. Part 960 are cited in this Petition they are unnecessary for an understanding of the Petition and, therefore, are not reproduced in the Appendix.

The following Nevada Statutes and Legislative resolutions are involved in this case:

NRS 459.910

Assembly Joint Resolution 4 (1989)

Assembly Joint Resolution 6 (1989)

They are reproduced in the Appendix, pp. 146 to 147.

STATEMENT OF THE CASE

In 1982, the Congress enacted the Nuclear Waste Policy Act (NWPA), Pub. L. No. 97-425, 96 Stat. 2211 (1983) (now codified, as amended, at 42 U.S.C. §§ 10101-10270) (1982 and Supp. V 1987)[2]. The NWPA, as originally enacted, provided a comprehensive legislative scheme for a national search for potentially acceptable repository sites (42 U.S.C. § 10136(a) (1982)) from which five would be nominated as suitable by the Secretary of Energy for site characterization. 42 U.S.C. § 10132(b)(1)(A) (1982). From these five sites, the Secretary of Energy was to recommend three to the President for the

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[2]Unless otherwise indicated, citation will be to Supp. V 1987.

actual process of characterization as candidate sites. 42 U.S.C. § 10132(b)(1)(B) (1982). After three sites had been found preliminarily suitable for a repository based upon site characterization results (42 U.S.C. § 10134(f)(1982), the Secretary was required to recommend one of them to the President for development as a national high-level radioactive waste repository. 42 U.S.C. § 10134(a)(1) (1982). The President was then authorized to transmit a recommendation of the site to Congress if he considered the site qualified for an application for a construction authorization for a repository. 42 U.S.C. § 10134(a)(2)(A).

On May 27, 1986, the Secretary nominated five sites for characterization as candidate sites (51 Fed. Reg. 19783-84, June 2, 1986) and recommended three sites, one each in Texas (Deaf Smith County),

Washington (Hanford Reservation) and Nevada (Yucca Mountain). The President approved the Secretary's recommendation.

On May 28, 1986, Nevada filed Case No. 86-7308, in which it sought review by the Ninth Circuit Court of Appeals of the Secretary of Energy's decision to proceed with the characterization of Yucca Mountain without having first acquired the jurisdiction and control over the site as required by the Nuclear Regulatory Commission's regulation, 10 C.F.R. § 60.121. Nevada contended that in the absence of the NRC's determination that a jurisdiction and control other than exclusive legislative authority was permissible, the Nevada Legislature's consent or cession of jurisdiction pursuant to Art. I, § 8, cl. 17 was required.

On December 22, 1987, the Congress amended the NWPA by bundling certain provisions entitled "Title V - Energy and

Environment Programs, Subtitle A - Nuclear Waste Amendments" Pub. L. No. 100-203, 101 Stat. 1330-227 (1987) (the 1987 NWPA amendments) with the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-202, 101 Stat. 1329 (1987) and Pub. L. No. 100-203, 101 Stat. 1330 (1987). The 1987 NWPA amendments designated Yucca Mountain as the sole site to be characterized for development as a repository site. 42 U.S.C. § 10172. Nevada's selection was made in the Conference Committee which considered the Senate version of the budget bill. The House version had no provisions amending the NWPA. No Nevada representatives were included in the Conference Committee.

Nevada was also selected by the 1987 amendments as an alternate to a site which may be selected through a process of voluntary negotiation with a willing state or Indian tribe. 42 U.S.C. § 10247(c)(2)(B).

On April 6, 1989, the Nevada Legislature enacted two resolutions, AJR 4 and AJR 6, which were approved by the Governor on April 17, 1989. App. 142 to 146. Assembly Joint Resolution 4, expressed the Nevada Legislature's "adamant opposition to the placement of a high-level radioactive waste repository in the State of Nevada." Assembly Joint Resolution 6 prohibited the Federal Government from establishing a repository at Yucca Mountain, Nevada, without the prior consent of the Nevada Legislature or a cession of jurisdiction pursuant to Chapter 328 of the Nevada Revised Statutes, which consent and cession were refused. On April 19, 1989, both AJR 4 and AJR 6 were transmitted to the President, the United States Senate and the House of Representatives. Congress took no action in response to the transmittal.

On June 28, 1989, the Nevada Legislature enacted Assembly Bill 222 which was signed into law by the Governor of the State of Nevada on July 6, 1989. Nevada Revised Statutes (NRS) 459.910 states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

App. pp. 146-147.

On September 18, 1989, the Nevada Governor, Bob Miller, requested an opinion from the Nevada Attorney General concerning the status of the repository program and the implications for various environmental permit applications filed by the DOE based upon his belief and his intention that AJR 4 and AJR 6 constituted a valid and effective notice of disapproval pursuant to Section 116(b), 42 U.S.C. § 10136(b) of the NWPA. The Attorney

General, in a letter opinion dated November 1, 1989, agreed that the Governor correctly characterized AJR 4 and AJR 6 as a notice of disapproval authorized by Section 116(b) of the NWPA, 42 U.S.C. § 10136(b). He further stated his opinion that the Yucca Mountain site had been disapproved by inaction from Congress.

On November 14, 1989, Nevada's Governor transmitted to Secretary of Energy, James D. Watkins, a letter notifying him that the Yucca Mountain site should be disqualified from further consideration based upon the State's notice of disapproval and the inability of the site to meet certain technical conditions referenced to criteria established by the Department of Energy in site suitability guidelines promulgated in 10 C.F.R. Part 960.

On November 29, 1989, Secretary of Energy, James D. Watkins, transmitted a

"Report to Congress on Reassessment of the Civilian Radioactive Waste Management Program," in which he made it clear that he would not recognize the State's notice of disapproval or disqualify the site. By letter dated February 28, 1990, addressed to the Governor of Nevada, the Secretary rejected the State's contention that Yucca Mountain should be disqualified because the presence of technical conditions rendered the site unsuitable for development as a repository.

On January 5, 1990, Nevada filed Case No. 90-70004, a petition for review of the Secretary of Energy's refusal to recognize Nevada's notice of disapproval as a veto of the site or a disqualifying condition and his failure to terminate site characterization activities because available evidence demonstrated that the site was not suitable under the Department of Energy's Guidelines.

On February 2, 1990, a motion's panel of the Ninth Circuit Court of Appeals ordered Case No. 90-70004 consolidated with Case No. 86-7308. The jurisdiction of the Court of Appeals is provided for in 42 U.S.C. § 10139(a)(1).

REASONS FOR GRANTING THE WRIT

I.

THIS CASE RAISES IMPORTANT CONSTITUTIONAL ISSUES CONCERNING THE ESTABLISHMENT OF FEDERAL FACILITIES IN UNCONSENTING STATES FOR THE STORAGE OF PRIVATELY PRODUCED, DANGEROUS SUBSTANCES

A. Federal Property Power

There are special and important reasons why this Court should review on writ of certiorari the Ninth Circuit Court of Appeals judgment and opinion in Case No. 86-7308 and Case No. 90-70004.

This is believed to be the first time in the history of the United States that the Congress of the United States has victimized a single state by forcing that State to accept a federal facility for the

emplacement forever of a privately produced hazardous and highly radioactive waste by-product which no other state will voluntarily accept. Yucca Mountain in southern Nevada has been tentatively selected, if found suitable, for the geologic storage of the high-level radioactive waste generated by the Nation's nuclear reactor power plants. None of the high-level radioactive waste which would be stored in a repository at Yucca Mountain is produced in Nevada.

Nevada's principal industries are concerned with tourism, recreation and gaming. These industries rely heavily on visitors from other states and countries. Other states and countries have similar industries that compete with Nevada for tourists and the recreating public. These industries are highly competitive and depend substantially on a favorable image. Nevada's visitors expect a safe and

environmentally sound location to visit.

The stigmatization and negative imagery associated with a high-level radioactive waste repository, particularly in terms of its popular media characterization as a "nuclear dump," tend to dissuade visitors from selecting Nevada as a vacation choice. Other negative implications, when amplified by the media in various ways,[3] have caused and will continue to cause Nevada and its citizens economic damage.

Nevada, representing the popular will of the political community of citizens that live in Nevada, has exercised the power to protect its economy and environment by enacting two legislative resolutions which state the Nevada Legislature and Governor's opposition to

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[3]Media amplification includes the media's penchant to dramatize and sensationalize in the nuclear context, for instance, what would ordinarily be a relatively incidental or minor accident. Because it pertains to nuclear waste, an event becomes a topic of enhanced significance.

the siting of a high-level radioactive waste facility at Yucca Mountain and by enacting a statute, NRS 459.910, which states:

> 1. It is unlawful for any person or governmental entity to store high-level radioactive waste in Nevada.
> 2. As used in this section, unless the context otherwise requires, "high-level radioactive waste" has the meaning ascribed to that term in 10 C.F.R. § 60.2.

The Ninth Circuit Court of Appeals has held that Nevada's attempted legislative veto of the development of the repository at Yucca Mountain is preempted by the Nuclear Waste Policy Act. App. 30.

The Ninth Circuit Court of Appeals identified the Property Clause, Art. IV, § 3, cl. 2, as the textual basis for Congress' authority to select Nevada's Yucca Mountain in the 1987 NWPA amendments. Nevada contends that the Property Clause does not entrust Congress with the power to accomplish the objectives of the NWPA. The Ninth Circuit Court of Appeals

ruling is an extreme departure from the existing precedents of this Court and conflicts with other applicable decisions of this Court. Furthermore, the Court of Appeals' judgment and opinion implicates important questions of federal law which should be settled by this Court.

The Ninth Circuit Court of Appeals extended this Court's dictum in *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) that, under the Property Clause, "[t]he power over the public lands thus entrusted to Congress is without limitations" to mean that the Property Clause, itself, is without limitations. The "power . . . thus entrusted" language of *Kleppe* was construed in *Pollard's Lessee v. Hagen et al.*, 44 U.S. (3 How.) 212, 224 (1845) as follows:

> Full power is given to Congress 'to make all needful rules and regulations respecting the territory or other property of the United States.' This authorized the passage of all laws necessary to secure the

> rights of the United States to the public lands, and to provide for their sale, and to protect them from taxation.

The Ninth Circuit Court's construction of the Property Clause departed dramatically from *Pollard's* limited authorization.

The Ninth Circuit Court held that the United States can make unlimited use of the public lands for the development of a facility for the disposal of privately produced hazardous and highly radioactive waste whether or not that type of facility is in violation of state law. By logical extension of the Court's holding, the Congress could chose to develop a brothel on BLM land in a state where prostitution was unlawful under authority of the Property Clause.

The lower court's analysis, if correct, could have been the basis for many of this Court's strongest precedents. The National Bank case, for instance, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.)

316 (1819), could have been decided on the simple proposition that the United States owned the commercial lot in Maryland, and could, therefore, build and operate a bank under authority of the Property Clause. If allowed to stand, the Ninth Circuit Court of Appeals' construction of the Property Clause would reduce most of Article I, section 8 of the Constitution to verbal surplusage.

The lower Court's suggestion that the Congress has absolute power to devote the public lands to private purposes is not supported by our history or this Court's precedents. In *Van Brocklin v. Tennessee*, 117 U.S. 151, 158 (1886), this Court stated that:

> The United States do not and cannot hold property as a monarch may for private or personal purposes.

The Ninth Circuit Court of Appeals' opinion raises concerns about the role which federal power plays over property

matters in the federal system. The decisions of this Court clearly require that an enumerated power, other than the Property Clause, must be demonstrated before the Federal Government may condemn property for a particular federal purpose in the federal courts. *See, e.g., Kohl et al. v. United States*, 91 U.S. 367, 371-72 (1875). *See also, United States v. Gettysburg Ry.*, 160 U.S. 668, 679-83 (1896). If private land in Deaf Smith County, Texas, were condemned as the site for the proposed repository, a delegated power other than the Property Clause would have to be advanced to justify the condemnation. Considerations of federalism would require that whatever federal power exists to site and develop a repository in Texas must be applicable in Nevada as well.

The Property Clause cannot reasonably be suggested as the underlying authority

for Congress' enactment of the Nuclear Waste Policy Act in 1982 because a number of potentially acceptable sites, and an untold number of potential sites for a repository, were located on private lands. It is inconceivable that when the NWPA was amended in 1987 that the Property Clause, retroactively, became the authority for the entire legislative scheme. The answer, of course, is that Congress had no such intent, nor was mention made of the regulation of federal property in any of the congressional reports or in the 1982 Act or the 1987 amendments.

One third of the Nation's land is federal property. *See, e.g., One Third of the Nations' Land*, a Report to the President and to the Congress by the Public Land Law Review Commission (Washington D.C., June, 1970). The Ninth Circuit Court of Appeals opinion, if allowed to stand, will have a dispro-

portionate, adverse effect on the public land states. Nevada land is more than 87 per cent federally owned. Nevada's governmental prerogatives will be severely affected by the Ninth Circuit Court of Appeals' decision in a variety of other public land contexts involving land, wildlife and water matters.

The Ninth Circuit Court of Appeals correctly recognized that Congress may, under the Property Clause, "control the occupancy and use of the public lands, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 405 (1917), protect the public from hazardous conditions on those lands, *Camfield v. United States*, 167 U.S. 518, 525 (1897) and regulate wildlife on those lands. *Kleppe v. New Mexico*, 426 U.S. at 540-41." App. 14. It is a giant conceptual step, however, to decree that the Property Clause empowers Congress to develop a federal facility for the

disposal of privately produced high-level radioactive waste on the public lands in violation of state law.

The Ninth Circuit Court of Appeals discussed the development of a high-level radioactive waste facility as a regulation of public land. Whether the establishment of a federal facility, unrelated to the management of public lands themselves, may be regarded as a regulatory power of the Property Clause is a question of great importance to the public land states. This Court should grant the writ of certiorari to settle this important question.

B. Equal Footing Doctrine

Having selected the Property Clause as the textual basis for Congress' authority to enact the NWPA, as amended, the Ninth Circuit Court of Appeals gave the NWPA preemptive effect over the State's refusal to accept the repository

under resolutions and laws enacted pursuant to the State's historic police powers.

While it is true that the states are not on a parity in terms of federal land ownership, they are on an equality in terms of political rights, sovereignty, and the exercise of jurisdiction. This Court has never suggested that aspects of a state's sovereignty and jurisdiction within the grant of the equal footing doctrine were displaced by the Property Clause. In fact, precisely the opposite is suggested by *Pollard's Lessee v. Hagen et al., supra*, 44 U.S. (3 How.) 212, 230 (1845) and its progeny. In *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977), this Court held that, as to submerged lands acquired under the equal footing doctrine, states had the power to establish general rules of property law which may be used to displace federal

ownership of lands or lands acquired pursuant to a federal grant where a navigable river subsequently meanders in its channel. This Court expressly overruled *Bonnelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973), which had held that the title conferred by the equal footing doctrine should be governed by federal common law. If the Property Clause was capable of preempting state law as to sovereignty and jurisdiction over lands that had passed to the states under the equal footing doctrine, *Corvallis* would have been decided differently, but as this Court noted:

> [I]n *Pollard's Lessee* itself the equal footing doctrine resulted in the State's acquisition of title notwithstanding the efforts of the Federal Government to dispose of the lands in question in another way.

Id. at 371.

This Court's holding in *Pollard's Lessee* was based on state sovereignty rather than a particular class of

property. This Court held that the United States did not have the right "to deprive the states of the power to exercise a numerous and important class of police powers." *Pollard's Lessee* at 230. In *United States v. Oregon*, 295 U.S. 1, 14 (1935) this Court established the over-arching principle that connects a state's ownership of the beds of navigable waters with the state's sovereignty:

> Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign of the lands to be held in private ownership or transfer of sovereignty itself.

The Ninth Circuit Court of Appeals correctly noted that "the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal . . . ." App. 31. The protection of a state's environment and economy represent historic police

power concerns supported by the constitutional grant of political rights and sovereignty contemplated by the equal footing doctrine. *See, e.g., Pacific Gas and Electric Co. v. State Energy Resources Conservation and Development Comm'n*, 461 U.S. 190, 206 (1983). Exercising its municipal sovereignty, the State of Nevada enacted a statute, NRS 459.910, which even-handedly prohibits the storage of *all* high-level radioactive waste in Nevada by private as well as governmental entities. *Compare Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

The states, even though initially unequal in terms of economic stature or standing, nevertheless, under the constitutional grant of the equal footing doctrine, enjoy "parity as respects political standing and sovereignty" (*United States v. Texas*, 339 U.S. 707, 716 (1950)) to enable them to protect what economic

advantages they have been capable of developing. No case decided by this Court has supported, even conceptually, the application of the Property Clause in the manner suggested by the Ninth Circuit Court of Appeals, i.e., to displace a state's power to enact protective legislation based on economic or environmental concerns. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 91-92 (1907); *cf. Pacific Gas and Electric Co. v. State Energy Resources & Development Comm'n, supra.* If the Ninth Circuit's analysis is allowed to stand, environmentally dangerous and unacceptable activities conducted on federal lands by federal agents and instrumentalities could escape state imposed environmental restrictions.

Kleppe v. New Mexico, 426 U.S. 529 (1976) is not inconsistent. *Kleppe* involved the protection of federal property, the wild and free roaming horses

and burros on the public lands, which Congress had identified as "an integral part of the natural system of the public lands." *Id.* at 535. Under the Property Clause, Congress has the power to protect its property[4] and to dispose of it without reference to a purpose under another enumerated power. *Cf., Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 330, 340 (1936).

This Court should grant review to address the important question of the extent to which the Property Clause may preempt legitimate exercises of a state's police powers in the circumstances of this case, *i.e.*, the development of a federal facility on public lands for privately produced hazardous and highly radioactive waste.

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[4]High-level radioactive waste is not property of the United States. Title is to be acquired at the time of the commencement of the operation of a repository. *See* Section 302(a)(5) of the NWPA, 42 U.S.C. § 10222(a)(5).

C. Tenth Amendment

In *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819), Chief Justice Marshall wrote:

> Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

Our purpose, in reference to Marshall's famous declaration on behalf of this Court, is to focus on the means which was used in selecting Nevada and whether the use of such means is consistent with the letter and spirit of the Constitution, in particular, the Tenth Amendment.

In *South Carolina v. Baker*, 485 U.S. 505, 511 n.5 (1988), this Court continued to speak approvingly of federalism and the part the Tenth Amendment plays in federalism concerns:

> We use the Tenth Amendment to encompass any implied constitutional limitation on Congress' authority to

> regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.

In *Baker*, this Court further suggested that the Tenth Amendment is violated when a state is "deprived of the right to participate in the national political process or that it was singled out in a way that left it politically isolated and powerless." *Id.* at 513.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550-51 (1985), the majority stated, in overruling *National League of Cities v. Usury*, 426 U.S. 833 (1976):

> Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principle means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.

The *Garcia* majority held that "State

sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." *Id.* at 552.

The Ninth Circuit Court of Appeals, adopting the "national political process" approach of the *Garcia* and *Baker* cases, dismissed Nevada's Tenth Amendment claims on the basis that "the tenth amendment does not protect a state from being outvoted in Congress." App. 22. The Court refused to recognize that the national political process operated in a defective way.

This case illustrates why *Garcia v. San Antonio Metro. Transit Auth.*, *supra*, and *South Carolina v. Baker*, *supra*, are wrong. If, as the Ninth Circuit Court held, *Baker and Garcia* uphold a national political process that can victimize one of its politically weakest members because

that member is defenseless in terms of political influence, then *Garcia* and *Baker* were wrongly decided and should be expressly overruled.

The rational of the *Garcia* and *Baker* cases suggest that the means by which the national political process protects the states is political accountability. *See, e.g., La Pierre, Political Accountability In The National Political Process - The Alternative To Judicial Review Of Federalism Issues*, 80 Northwestern L. R. 577, 583 (1985). Political accountability may provide "a comprehensive, systematic explanation and justification of Congress' power to control the allocation of authority between the states and the nation." *Id.* Political accountability, however, is deficient when used to justify the case where forty-nine of the states "gang up" on a single state to relieve themselves of an unwanted burden. The

members of Congress are not politically accountable to the object of their discriminatory legislation, the residents of Nevada. The accountability they owed to their own constituents and to political action committees bolstered, rather than checked, their unbridled exercise of power over Nevada's interests. No deference is owed to the national political process under these circumstances.

Representatives of states who were interested in removing candidate sites in their own states from consideration as repositories spear-headed the effort in the conference committee to victimize Nevada. The Ninth Circuit Court of Appeals correctly noted that "This legislation [the 1987 amendments] was drafted by the Conference Committee. The House version of the budget bill had no provisions amending the NWPA." App. 9. Bennett Johnston, United States Senator

from Louisiana, had caused Amendment No. 1263 to be attached to the Omnibus Budget Reconciliation Act (H.R. 3545). It was this bill (S. 1920) that was referred to the Conference Committee. Under applicable parliamentary procedure, the Senate's amendments to the Omnibus bill should have either been concurred in or disagreement expressed in some way. A conference was called, however, without evidence of disagreement. Issues that can be discussed in conference are only those subject to disagreement. "The managers of a conference must confine themselves to the differences committed to them, . . . and may not include subjects not within the disagreements . . . ." *Jefferson's Manual* and *Rules Of The House Of Representatives*, § 5.46, House Document No. 96-398, 96th Congress, 2d Session. In violation of parliamentary procedure, the Senate's offer was rewritten to identify

Yucca Mountain as the only site to be characterized and adopted behind the closed doors of the Conference Committee rather than exposed to additional open and public debate. The political process was defective and left Nevada's representatives isolated and powerless to object to what had by then become a *fait accompli*.

The selection of Nevada by the Conference Committee as the only site to be characterized was submerged in the Omnibus Budget Reconciliation Act. The bundling of non-germane legislation which discriminates against a single state with an Omnibus budget bill offends both the letter and spirit of the bicameralism and presentment principles of Article I (Art. I, § 7, cl. 2) because neither the Congress nor the President can give line-item consideration to the subject matter of the conference committee's report. Bundling in this manner represents an

additional defect in the political process which left Nevada isolated and powerless.

This Court should review the lower Court's treatment of the Tenth Amendment and clarify or adjust its recent decisions in the interest of confirming the principles of federalism underlying the Tenth Amendment that are consistent with the letter and spirit of the Constitution.

II.
THIS CASE RAISES IMPORTANT ISSUES CONCERNING AN UNCONSENTING STATE'S LEGISLATIVE POWER TO VETO OR OTHERWISE DISAPPROVE THE SELECTION OF A SITE WITHIN ITS BORDERS FOR THE DISPOSAL BY THE FEDERAL GOVERNMENT OF PRIVATELY PRODUCED, DANGEROUS SUBSTANCES

A. Preemption

In previous sections of this petition, the State has presented reasons why this Court should grant the petition for writ of certiorari to review the basis for federal power to select a site for the development of a federal facility for the emplacement, forever, of privately produced high-level radioactive waste in

an unconsenting state. If, as the State contends, the power does not exist or is limited as contended, preemptive capability is not present. Even if the federal power were found to exist, and not subject to the limitations advanced, the important questions involving federal-state relationships which were discounted by the Ninth Circuit Court of Appeals should be addressed and settled by this Court.

The Ninth Circuit Court of Appeals determined that "Nevada's attempted legislative veto . . . is preempted by the NWPA." App. 30. The Court based its preemption analysis not on the proposition "that Congress has expressly preempted the field of nuclear waste disposal" (App. 30) but because Nevada's attempted legislative veto stands as an obstacle to the accomplishment of the full purposes and objectives of Congress. App. 30.

The Court candidly recognized that

under this Court's holding in *Pacific Gas & Electric Co., supra*, a "California statute that conditioned the construction of a nuclear power plant . . . was not preempted by federal law because it was motivated by economic concerns." App. 30. The Court also recognized that this "Court concluded that the state law being challenged was not preempted by the federal laws regulating nuclear safety because it was motivated by economic concerns." App. 31. The Ninth Circuit Court of Appeals further recognized that "the professed motivation for Nevada's legislative veto is the economic and environmental effects of nuclear waste disposal." *Id.* Nevertheless, the Court held Nevada's attempted veto preempted.

By fixing on "conflict preemption" the Court appears to give controlling weight to the fact that Nevada's veto "has

the actual effect of frustrating Congress' intent." *Id.* The lower Court lost sight of the important fact, however, that the Federal Government is simply the surrogate or agent for the utilities. The utilities lobbied for the NWPA and were successful. They agreed, as Sections 111(a)(4), (5), and (b)(4), 42 U.S.C. § 10131(a)(4), (5) and (b)(4) provide, to pay for all costs of the federal program by the fee imposed on each kilowatt hour of power sold to their customers.[5] This fact should have modified the Court's "conflict preemption" analysis. The conflict simply does not implicate a federal interest. Without "conflict preemption" Nevada is in an analogous situation to California in the

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[5]The State contended in the Court below that the federal repository program as established under the NWPA could not be authorized under the General Welfare Clause because it is privately funded. The payment of the costs of the program by the utilities rather than from the general revenue conflicts with the uniformity requirement of Art. I, § 8, cl. 1. *See, e.g., Head Money Cases*, 112 U.S. 580, 595-96 (1884). The Respondents acquiesced as to this point in the Court below.

P.G. & E. case. This Court should grant review and clarify what appears on its face to involve a clear disparity of treatment in terms of the preemption of state legislative enactments based upon identical state interests.

B. The Efficacy of Nevada's Veto - The Guarantee Clause

The Ninth Circuit Court of Appeals recognized that Nevada has the right under Section 116(b), 42 U.S.C. § 10136(b), to submit a notice of disapproval "not later than 60 days after the date that the President recommends such site to Congress." App. 25. The President's approval of the 1987 amendments was a *de facto* recommendation. Yucca Mountain was then in immediate jeopardy. Delay would have been futile, given the legislative history of the 1987 amendments. Moreover, it would have been irresponsible to permit the expenditure of billions of dollars of

ratepayers' contributions when Nevada clearly anticipated that it would transmit a notice of disapproval at the end of the process.

Nevada's veto was not preempted because the NWPA invited it. The only question, therefore, was the timeliness of the transmittal of the notice of disapproval. The Court recognized the basis of the State's claim that the notice of disapproval should be deemed timely and effective as follows:

> The Nevada legislature meets on a biennial basis for approximately five to six months. Nev. Const. art. 4, § 2. Because of this schedule, Nevada asserts that the Secretary and the President may time the recommendation of Yucca Mountain as the repository site at a time when the legislature is not in session. The Governor may then refuse to call a special session of the legislature, pursuant to Nev. Const., art. 5, § 9, and then decline to submit a notice of disapproval. By doing so, the Secretary and the President will deprive the citizens of Nevada of the "Republican Form of Government" guaranteed by Article IV, section 4 of the Constitution "because their representatives in the Legislature

> may be deprived of the opportunity to vote on the measure at the Governor's option." Petitioners' Opening Brief at 51.

App. 26. The lower Court summarily denied Nevada's contention that the timing constraints were constitutionally defective because the State's above-referenced "claim is wholly speculative" and "challenges to legislation based on the Guarantee Clause are not justiciable." App. 26. Nevada's claim is based on probabilities, not speculation. If the recommendation occurs, it is at least four times more probable that it will be made when the Legislature is out of session. Should this happen, the Legislature will be powerless, on its own, to submit a notice of disapproval.

This Court should consider whether Section 116, as applied to Nevada's circumstance, is a law that infringes on a State's ability to decide on the basis of a guaranteed Republican form of government

"who has the authority to act on behalf of government," *Morgan v. South Bend Community School Corp.*, 797 F.2d 471-77 (7th Cir. 1986); or "the power to structure their internal government," *Bradley v. School Bd.*, 462 F.2d 1058, 1068 (4th Cir. 1972); *affirmed by an equally divided Court*, 412 U.S. 92, 93 (1973); or "the exclusive power to allocate the functions of the executive, judicial, and legislative processes as they wish," *United States v. Mantel*, 415 F. Supp. 1025, 1031 (D. Md. 1976).

This Court should grant review to settle the important question of whether the Republic is best served by reinforcing the ability of independent state governments to check the abuses of power by the Federal Government by the full enjoyment of their Republican forms of government. *See, e.g., Garcia v. San Antonio Metro., supra*, 571 (Powell, J. dissenting); *FERC*

v. Mississip, 456 U.S. 742, 790 (1982) (O'Connor, J. dissenting in part.) This Court should reconcile state autonomy and national power by recognizing that the federalism principles rooted in the Guarantee Clause accord each a proper role in the federal system. *See, e.g., Merritt, The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 Colum. L. Rev. 1, 2, 70-78 (1988) (arguing that judicial enforcement of the Guarantee Clause is proper); *South Carolina v. Baker, supra*, at 531 (O'Connor, J. dissenting).

III.

THIS CASE RAISES IMPORTANT QUESTIONS REGARDING THE LEVEL OF DISCRETION WHICH THE CONGRESS MAY DELEGATE OR HAS DELEGATED TO EXECUTIVE DEPARTMENT OFFICERS RELATIVE TO WHEN A SITE SHOULD BE DISQUALIFIED FROM FURTHER CONSIDERATIONS FOR HIGH-LEVEL RADIOACTIVE WASTE SITE PURPOSES

The Ninth Circuit Court of Appeals correctly recognized that: "As amended Section 10133(b) . . . makes clear, the

guidelines developed by the Secretary pursuant to section 10132(a) are to be utilized to determine the suitability of Yucca Mountain for the location of the repository." App. 33. The Court also correctly noted Nevada's contention "that the Secretary has a judicially enforceable duty to determine, throughout the site characterization process, whether any disqualifying conditions exist."

The Ninth Circuit Court of Appeals held that "the statute appears to commit the timing of the Secretary's decision regarding disqualifying conditions to his discretion." Nevada contends that the lower Court placed too narrow a construction on the statutory scheme. Characterization of Yucca Mountain may cost as much as $3 billion dollars according to the latest estimates. It defies common understanding that Congress intended to afford the Secretary of Energy

the sole discretion to continue pursuing site characterization activities at Yucca Mountain without a procedural methodology in place to identify and evaluate whether Yucca Mountain is unsuitable for development of a repository based on evidence that becomes available during the investigative studies.

Congress delegates its legislative power subject to the limitations of a prescribed standard or intelligible principle. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). Congress specified with precision the content of the guidelines which it directed the Secretary of Energy to promulgate. Section 112(a), 42 U.S.C. § 10132(a) of the NWPA. The guidelines are set forth at 10 C.F.R. Part 960.

When Congress amended the NWPA in 1987, it added certain provisions to Section 113(c), 42 U.S.C. § 10133(c), which provide in part:

> (3) If the Secretary at any time determines the Yucca Mountain site to be unsuitable for development as a repository, the Secretary shall
>
> (A) terminate all site characterization activities at such site;
>
> * * * * *
>
> (F) report to Congress
>
> . . . .

The reason Congress added the foregoing provisions to the NWPA was directly related to its recognition that by proceeding to characterize a single site, it must institute precautionary measures in anticipation of the possibility that the single site may prove unsuitable. Congress amended the NWPA with the intent that it would be notified by the Secretary of Energy as to a determination of unsuitability as early as possible in the process of site characterization.

The NWPA, as amended, clearly established the Secretary's duty to have and implement a process during site characterization for the ongoing evaluation of whether the Yucca Mountain site should be determined unsuitable pursuant to the site recommendation guidelines (10 C.F.R. Part 960) required by the Act. The NWPA, as amended, restricts site characterization activities to those "the Secretary *considers necessary* to provide the data required for *evaluation* of the suitability" of the site for a license application to the NRC, and for the site EIS. (Emphasis added). 42 U.S.C. § 10133(c). It requires him to report not less than once every six months "on the nature and extent of such activities and the *information developed* from such activities." (Emphasis added). 42 U.S.C. § 10133(b).

The *information developed* must include an *evaluation* of whether any 10 C.F.R. Part 960 disqualifying conditions have been found from the data in order for the Secretary to determine what, if any, further activities he *considers necessary*. Therefore, when and how the Secretary makes his suitability evaluation is not a matter the NWPA, as amended, leaves to his discretion. Congress clearly intended that he have a methodology to guide his consideration, and he must report the results of his ongoing considerations at least every six months.

This Court should grant review of the lower Court's opinion to clarify the important question involving the standard by which Congress delegated its legislative authority in this case.

CONCLUSION

For the foregoing reasons, it is respectfully requested that this Court

grant the petition for writ of certiorari.

Respectfully submitted,

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